



STATE OF INDIANA

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April 5, 2012

Mr. Alan J. Kreilein
DOC 871626
3038 W 850 S.
Bunker Hill, IN 46914-9810

Re: Formal Complaint 12-FC-72; Alleged Violation of the Access to Public Records Act by the Miami Correctional Facility

Dear Mr. Kreilein:

This advisory opinion is in response to your formal complaint alleging the Miami Correctional Facility ("Facility") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Michael Barnes, Attorney, responded on behalf of the Facility. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on March 6, 2012, you submitted a request for records to the Facility for copies detailing an accounting of funds for the Wiccan Account (sic) dating back to October 29, 2008. You also asked for the name and address of the federal office responsible for the \$500 grant that the group is supposed to receive annually. You provide that you submitted the records requests on behalf of the Wiccan Group at the Facility. You maintain that the Facility violated the APRA by not providing to you the exact costs of the records in advance, not allowing you to inspect the records, and by not copying the records in the manner that you had requested.

In response to your formal complaint, Mr. Barnes advised that the Facility responded to your request pursuant to the requirements of the APRA. The APRA provides that an agency may require advance payment for the records that are sought. *See* I.C. § 5-14-3-8(e)(2). Here, the Facility informed you that your request would produce hundreds, if not thousands of pages of documents. The records are kept in a digital format and the program used for storing the records does not format the documents in such a way that an accurate accounting of pages is possible. As to your request for the address and information related to the federal grant that the Wiccan Circle received, the Facility does not maintain a record that is responsive to your request.

In your formal complaint, but absent from your original request submitted to the Facility, you sought to have the copies duplexed and to be able to inspect the records. Ms. Barnes noted that you are considered an Offender pursuant to I.C. § 5-14-3-2(i). As such, the only way for you to inspect the records would be for you to leave the secured area of the Facility, which would create a significant risk for all parties involved. As to the issue of having the records duplexed, the Facility will inquire if equipment is available of providing copies in such a manner; however in your subsequent requests submitted to the Facility, you need indicate at that time your desire to have the records duplexed.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The Facility is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the Facility’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here the Facility responded to your written request for records within seven (7) days of its receipt. As such, it is my opinion that the Facility complied with the requirements of section 9 of the APRA in responding to your request.

The APRA permits a public agency to charge a fee for copies of public records. *See* I.C. § 5-14-3-8. Additionally, a public agency may require a person to pay the copying fee in advance. *See* IC 5-14-3-8(e). Nothing in the APRA requires that a public agency waive a copying fee. *See Opinion of the Public Access Counselor 07-FC-124*. In its response to your request, the Facility provided that your request would produce hundreds, if not thousands of records. At the time of your request, you had a balance of \$8.22 in your offender trust account. Mr. Barnes estimated that you would need \$196 in your account before the Facility would prepare and print out the requisite records. The Facility has provided that it would impossible to definitively determine how many records would actually be produced due to the nature of the records that were sought. It is my opinion that the Facility did not violate section 8 of the APRA in providing a cost

estimate in response to your request for records. Should you attain the necessary funds to cover the fees associated with your request, the Facility would be required to provide the records to you, minus any applicable exception. Under such a scenario, if the cost of the production of the records fell short of the \$196 estimate, the Facility would be required to reimburse you for the overpayment.

Generally, if a public agency has no records responsive to a public records request, the agency does not violate the APRA by denying the request. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Opinion of the Public Access Counselor 01-FC-61*; see also *Opinion of the Public Access Counselor 08-FC-113* (“If the records do not exist, certainly the [agency] could not be required to produce a copy....”). Moreover, the APRA does not require a public agency to create a new record in order to satisfy a public records request. See *Opinion of the Public Access Counselor 10-FC-56*. As to your request for information regarding the source and contact information for the federal agency that provided a grant to the Wiccan Circle, the Facility has provided that it does not maintain a record responsive to your request. Thus, it is my opinion that the Facility did not violate the APRA by failing to produce a record that it is not required to maintain.

As to your request to inspect the records, this issue has been addressed by our office on a number of occasions. Counselor Hurst provided the following analysis in a 2004 advisory opinion:

Similarly, circumstances may exist where physical inspection of a record is not practical or even possible, and reasonable access can only be accomplished through production of a copy of the record. Such is the case here. Certainly, as an incarcerated offender, it is not possible for you to appear at a public agency during its normal business hours and inspect the records of that agency. See IC 5-14-3-3(a). Your status is no less significant when seeking to inspect the records of the facility where you are incarcerated. The APRA is a statute of general application, which means the APRA governs unless some other more specific statute addresses the issue. The Department, through its various institutions, is charged with the authority and discretion to ensure the safety and security of the institution and of the offenders under its control. See, e.g., IC 11-11-6-1. In this regard, Indiana law provides the Department and its institutions with the authority to restrict your movement and access within the Department’s institutions. This has the net effect of restricting your access to inspect the public records of the facility within the facility where they are kept. In my opinion, the institutional safety and security restrictions authorized by Indiana law and exercised by the Department and the MCC on your access to areas of the MCC, even to those areas where public records are maintained, does not violate your rights under the APRA. It is my further opinion that the APRA does not require the Department or any of its institutions to allow you to inspect the public

records in a “secure area,” or to otherwise bring the records to you so that you may inspect them. *See Opinion of the Public Access Counselor 04-FC-43.*

As such, the Facility did not violate the APRA by denying your request to inspect the records that were requested.

CONCLUSION

For the foregoing reasons, it is my opinion that the Facility did not violate the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Michael Barnes